

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-6126

In the
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 75-6126

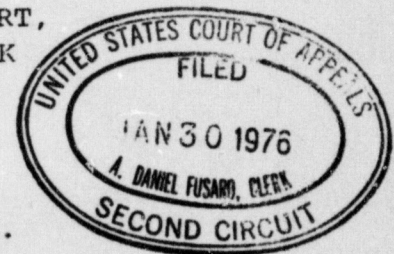
Interstate Commerce Commission,
Plaintiff-Appellee

v.

Associated Air Freight, Inc.,
Defendant-Appellant

ON APPEAL FROM JUDGMENT AND ORDER
OF UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT
ASSOCIATED AIR FREIGHT, INC.



Of Counsel:

Grove, Jaskiewicz, Gilliam
and Cobert
1730 M Street, N. W.
Washington, D. C. 20036

January 30, 1976

Leonard A. Jaskiewicz
Edward J. Kiley
1730 M Street, N. W.
Washington, D. C. 20036

Attorneys for Defendant-
Appellant Associated Air
Freight, Inc.

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ON APPEAL FROM JUDGMENT AND ORDER
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EASTERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT
ASSOCIATED AIR FREIGHT, INC.

Associated Air Freight, Inc., appeals from the
Judgment and Order of the United States District Court for
the Eastern District of New York, Weinstein J., dated
November 23, 1975, which Judgment and Order granted the
Motion for Summary Judgment of the Interstate Commerce
Commission and permanently enjoined and restrained

Associated Air Freight, Inc., from refusing to submit any and all of its accounts, books, records, memoranda, correspondence, and other documents to the Interstate Commerce Commission.

STATEMENT OF QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission, pursuant to 49 U.S.C. §1012(d), may require production of all records in the possession and control of Associated Air Freight, Inc.

2. Whether the District Court erred in permanently enjoining and restraining Associated Air Freight, Inc., from failing or refusing to submit any and all of its accounts, books, records, memoranda, correspondence, and other documents to the Interstate Commerce Commission.

3. Whether the District Court erred in granting the Motion for Summary Judgment submitted by the Interstate Commerce Commission.

4. Whether the District Court erred in failing to grant the Motion to Dismiss submitted by Associated Air Freight, Inc., pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, in that the Interstate Commerce

Commission had failed to state a claim in its complaint upon which relief could be granted.

REFERENCES TO PARTIES AND RULINGS

The Judgment and Order of the United States District Court for the Eastern District of New York, Weinstein, J., from which Judgment and Order this appeal is taken, are not reported. The Judgment and Order appear in the Joint Appendix, submitted with this brief, at page A-76.

Associated Air Freight, Inc., and the Interstate Commerce Commission are the only parties to this litigation. This case has not previously been before this Court under the same or similar title and to Appellant's knowledge there are no cases pending before this Court or future cases directly related which may be presented to this Court.

STATEMENT OF THE CASE

This case arose before the District Court under Section 417(b)(1) of the Interstate Commerce Act [49 U.S.C. §1017(b)(1)], as a suit for injunctive relief filed by the Interstate Commerce Commission against Associated Air

Freight, Inc., and based upon alleged violations on the part of Associated Air Freight, Inc., of Section 412(d) of the Interstate Commerce Act [49 U.S.C. §1012(d)].

Associated Air Freight, Inc., is a Virginia corporation, with its principal place of business in Jamaica, Queens, State of New York. Associated Air Freight, Inc., is licensed by the Civil Aeronautics Board, under CAB Permits 54 and 116, as a domestic and international air freight forwarder. Associated Air Freight, Inc., is also licensed by the Interstate Commerce Commission, in Permit No. FF-401, as a surface freight forwarder.^{1/}

On or about January 13, 1975, an employee of the Interstate Commerce Commission, identifying himself as such,

^{1/} It should be noted that all of Associated Air Freight's revenue is derived from its CAB operations, and Associated has never conducted any operations under its ICC permit. It should also be noted that in Docket No. FF-C-59 the Interstate Commerce Commission is presently attempting to revoke the surface freight forwarder permit of Associated Air Freight on the ground that Associated has, in fact, not conducted any operations under such permit. (See Appendix I to Brief for Order instituting investigation.)

appeared at the principal place of business of Associated Air Freight, Inc., and demanded the production of certain records in the possession and control of Associated Air Freight, Inc., and dealing specifically with Associated's air freight forwarding operations, under its CAB licenses, and involving Minneapolis, Minnesota. Associated Air Freight, Inc., refused to permit the Commission agent to remove copies of these documents from the Associated property, though limited inspection was allowed.

On or about January 14, 1975, the Interstate Commerce Commission sent to Associated Air Freight, Inc., a formal demand letter, quoting Section 412(d) of the Interstate Commerce Act, demanding access to any and all records of Associated Air Freight, Inc.

On or about January 20, 1975, Associated Air Freight, Inc., notified the Commission that general inspection of Associated Air Freight's air forwarding records would be permitted only to agents of the Civil Aeronautics Board, but that specified documents might be examined by the Commission at the applicable Associated terminal location which prepared such specified documents. Again, on January 30, 1975, a Commission agent demanded access to

all of Associated's files, on the ground that it held an ICC permit. Such access was denied by Associated Air Freight, Inc.

On or about July 30, 1975, the Interstate Commerce Commission filed in the United States District Court for the Eastern District of New York a Summons and Complaint requesting injunctive relief in the nature of an order compelling Associated Air Freight, Inc., to submit to the Commission for inspection ". . . any and all of its accounts, books, records, memoranda, correspondence, and other documents . . ." to Commission agents, without limitation. (Joint App., A-6.) The matter was assigned to the Honorable Jack B. Weinstein, Judge.

Thereafter, on or about September 18, 1975, Associated Air Freight, Inc., filed a Motion to Dismiss the Complaint of the Interstate Commerce Commission (Joint App., A-9), and based such Motion on assertions that the Complaint failed to allege facts which constituted a violation of the quoted portion of the Interstate Commerce Act, and that such Complaint failed to state a claim upon which relief could be granted. A response to such Motion was filed by the Commission. (Joint App., A-37.) Such Motion was denied by Judge Weinstein on October 3, 1975, following a hearing at which no transcript

was made, and no Order prepared. Associated Air Freight, Inc., then filed its answer to the Complaint. (Joint App., A-48.)

On or about November 6, 1975, the Interstate Commerce Commission filed a Motion for Summary Judgment (Joint App., A-54), and Associated Air Freight, Inc., replied thereto (Joint App., A-62). A hearing on that Motion was held November 21, 1975, and the Commission's Motion was granted. The Judgment and Order of Judge Weinstein granting the injunctive relief requested by the Commission was filed November 23, 1975. (Joint App., A-76.)

Associated Air Freight, Inc., filed its Notice of Appeal on November 25, 1975 (Joint App., A-77), and on November 25, 1975, Judge Weinstein enjoined the final Judgment and Order pending the resolution of the Appeal. (Joint App., A-78.)

ARGUMENT

I. The Inspection Provision of
Part IV of the Interstate
Commerce Act Extends Only to
Those Records Required to be
Maintained by Forwarders
Subject to Part IV.

The principal issue here is a simple one. The Interstate Commerce Commission maintains that §412(d) of the Act [49 U.S.C. §1012(d)] provides for inspection and

copying of any and all records of any company holding a Commission license as a surface freight forwarder. The Commission insists that §412(d) stands apart from the remainder of §412, and contains a separate and plenary investigatory power which can be applied against any person holding such license. The District Court has apparently taken the same position, in that the Judgment and Order, and the injunctive relief granted therein, apply to any and all of Associated's records, without qualification or limitation. (Joint App., A-76.)

It is now, and always has been, the position of Appellant that §412 must be read as a whole, and that the 412(d) inspection and copying provision only applies to those records which the remaining portions of the section, and regulations promulgated pursuant to that section, are required to be kept. 412(d) is not a general search warrant authorizing the Commission to examine and copy each and every record which a person might have.

§412 provides that freight forwarders subject to Part IV of the Act may be required to file annual or special reports, and may be required to follow a uniform system of accounts prescribed by the Commission [412(a)]; also prescribed is the period covered by such reports, and that

such reports must be sworn to [412(b)]; the forms of such accounts and records may be prescribed, and the length of time such records and accounts must be kept are provided for [412(c)]; and the rules governing record destruction [412(e)]. In the midst of all this appears the 412(d) inspection provision. Such provisions as have been described are also found, virtually word for word, in other parts of the Act applying to railroads and express companies [§20(1), (2), (5), (6), (7)(b); 49 U.S.C. §20(1), (2), (5), (6), (7)(b)], motor carriers [§204(a)(1), (2), (4), §220(a), (d), §221(d); 49 U.S.C. §§304(a)(1), (2), (4), 320(a)(d), 311(d)], and water carriers [§313(a), (e), (f), (g); 49 U.S.C. §913(a)(e)(f)(g)].^{2/}

The question, then, is whether the inspection and copying provision applies to any accounts and records not described in §412, such as record of air freight forwarder operations subject to the jurisdiction of the Civil Aeronautics Board.

^{2/} Significantly, the Civil Aeronautics Board has nearly identical inspection and copying authority, in the same statutory context, in the Federal Aviation Act, Section 407 [49 U.S.C. §1377(e)].

The courts of the United States are in agreement that such inspection and copying provisions are to be read in connection with the remainder of the appropriate section providing for the filing of annual reports and the maintenance of accounts in conformance with a Commission established uniform system, and that such provisions are not general investigatory tools.

An in-depth consideration of the entire issue, relating to the inspection and copying provisions of Part I of the Act (railroads), Section 20(5), was recently made by the United States Court of Appeals for the District of Columbia Circuit in Burlington Northern, Inc. v. Interstate Commerce Commission, 462 F. 2d 280 (D.C.Cir. 1972), cert. den. 409 U.S. 891 (1972).

In Burlington the Commission, relying on the inspection and copying provisions of Section 20(5), from which Section 412(d) was taken, sought to obtain budget, cash flow, and income forecasts. The Commission's reliance was on the wording of the section authorizing inspection and copying ". . . any and all accounts, books, records, memoranda, correspondence, and other documents of such carriers, lessors and associations. . . ." The Court's analysis of the Commission's construction of that section is instructive:

This construction of Section 20(5) would give the Commission under that section general investigatory powers not necessarily related to the Commission's authority to prescribe the forms of accounts and records. It would extend the scope of Section 20(5) to give the Commission unlimited access to all the papers and documents of the railroad relating even remotely to the regulatory interests of the Commission. (462 F. 2d, at 285)

After considering the Supreme Court's consistently narrow interpretation of such inspection provisions, referring principally to United States v. Louisville & Nashville Railroad Company, 236 U.S. 319, 334 (1915), (462 F. 2d, at 285-287), the Court in Burlington concluded that such provisions do not permit general investigations of all records, but only inspection of those accounts and records which the applicable section requires regulated entities to maintain. At pages 287-288, the Court stated,

From this analysis of the history of Section 20 we conclude that the Supreme Court's narrow construction of the purpose of the section is still controlling despite the 1920 and 1940 amendments. That purpose is to maintain a uniform

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accounting system and to permit the analysis and interpretation of records which are required to be kept by carriers. The Commission's access to memoranda and other materials in the possession of carriers must, therefore, be confined to circumstances in which the need for information relating to or explanatory of required accounting and bookkeeping entries is evident. . . . [T]hey do not extend to . . . [records] . . . which have no apparent relevance to the understanding or evaluation of accounting and bookkeeping entries.

Burlington Northern, Inc. v. Interstate Commerce Commission, supra, and the interpretation of regulatory inspection provisions was recently followed by the United States District Court for the Northern District of Illinois in Civil Aeronautics Board v. United Airlines, Inc., 399 F. Supp. 1324 (N.D.Ill. 1975).

In United Airlines CAB personnel, relying on Section 407(e) of the Federal Aviation Act [49 U.S.C. §1377(e)], demanded general access to United Airlines' files. ^{3/}

^{3/} At 399 F. Supp., at 1327-1328, the Court noted the similarity between the inspection provisions in the Federal Aviation Act and those in the Interstate Commerce Act.

In a suit for injunctive relief, the Board, unlike the Commission here, narrowed its demand to certain specific documents. Nonetheless, the Board contended that the statute allowed access ". . . to all papers on United's premises . . ." (399 F. Supp., at 1327). United Airlines contended, as does Appellant here, that the language permitting inspection must be read in light of the entire section of the Act, which requires that certain records be kept.

In arriving at its decision granting United's motion for summary judgment, the Court followed the decision in Burlington Northern, Inc., supra, closely:

The District of Columbia Circuit Court of Appeals recently held that Act [the Interstate Commerce Act] provides no plenary right to search, but that the statute allows disclosure only of the records required to be kept or the supporting documents to those records. See Burlington Northern, Inc. v. ICC, 149 U.S. App. D.C. 176, 462 F. 2d 280, cert. denied 409 U.S. 891, 93 S. Ct. 120, 34 L. Ed. 2d 148 (1972). In Burlington the Court reviewed the history of Section 20. . . . The Court in Burlington, however, narrowly construed the amended Section 20 to allow for inspection of only those

documents and correspondence required to be kept or related thereto. In another case, the ICC admitted that it had no general right to search under Section 20. See Cooper's Express, Inc. v. ICC, 330 F. 2d 338, 340 (1st Cir. 1964). It should be noted that Section 20 closely parallels the statute at issue here and that the ICC was a model for other transportation regulatory agencies. 399 F. Supp., at 1327-1328.

Not only did the Court in Civil Aeronautics Board v. United Airlines, Inc., deny to the CAB a general right of search under its inspection provision, but also noted that to accede to the Board's position would raise a serious Constitutional issue.

Finally, a court should not construe a statute in such a manner as to raise a serious Constitutional issue. Agencies can require certain records to be kept and to be inspected without violating the Fourth Amendment. (Citations omitted.) However, a serious Constitutional question is raised as to an agency's right to inspect all documents in a company's possession. (Citations omitted.) (399 F. Supp., at 1328.)

The Commission here has demanded to see "records of air freight forwarding operations," "air freight forwarding bills of lading" (Complaint, Joint App., A-3, A-4), "and records of certain air freight forwarding operations" (Motion for Summary Judgment, Joint App., A-57). These are hardly accounting and bookkeeping records required by the Commission to be kept under regulations promulgated in accord with Section 412. Nor are they records relating to such documents. Despite this fact, the Commission has insisted on an unrestricted right of "inspection of Associated's files" (Complaint, Joint App., A-5), and access to all of Associated's "transportation records" (Formal Demand Letter, see Joint App., A-57), regardless of the fact that such records only relate to CAB-regulated air forwarding operations, inasmuch as Associated has never conducted any surface forwarding operations.

The District Court has rejected the interpretation of this statute by other Federal District Courts, other Circuit Courts of Appeal, and the United States Supreme Court, and has given to the Commission a general search warrant applicable to any record or document, regardless of its nature, in the possession of any person holding a license from

the Commission. Had Congress intended to give such authority, would they have buried it in the midst of an accounting and bookkeeping provision?

This very question was addressed by the Court in the United Airlines decision, supra, at page 1327. It is submitted that this Court should reach the same conclusion.

It seems unlikely that Congress would grant the CAB so important a right as a plenary power to search a company's files, albeit a highly regulated company, in a subparagraph of a section which requires that certain specified records be maintained. Nor does the legislative history of this statute reveal any such intent by Congress.

Even Cooper's Express, Inc. v. Interstate Commerce Commission, 330 F. 2d 388 (1st Cir. 1964), relied upon so heavily by both the Commission (Joint App., A-41) and by Judge Weinstein (Joint App., A-74), is in accord with Appellant's position. As correctly noted by the Illinois District Court, in United Airlines, supra at 1328, Cooper's recognizes the fact that such inspection provisions are not the general search warrant asserted by the Commission, and that such agency admits that fact. The Court in Cooper's correctly noted the limits of

the Commission's power of inspection when it stated, at 340 of the decision,

It is well settled that Congress may require a corporation engaged in a business subject to federal regulations to keep certain records and make them available for official inspection in order to provide for effective administration and enforcement. (Citations omitted.) (Emphasis added.)

Of course, the Interstate Commerce Commission does not require any person to keep records of air freight forwarder operations, for the simple reason that such agency has no jurisdiction over such operations. Consequently, the ICC inspection provision may not apply to such records.

For the reasons stated above, it is submitted that the Interstate Commerce Commission has no right of inspection with respect to all records of Associated, and certainly no right of access to Associated's records reflecting air freight forwarding operations. The District Court's Judgment and Order granting such a right is error, and merits reversal.

II. The District Court Erred
in Granting the Motion for
Summary Judgment of the
Interstate Commerce Commission.

The grounds for the action of the District Court in granting the Motion for summary Judgment of the Interstate Commerce Commission are difficult to discern. The Judgment and Order of the Court states nothing more than that Associated Air Freight, Inc., is enjoined permanently from denying access to Commission personnel from any of its records, apparently regardless of source or purpose.

The brief transcript (Joint App., A-70) on the hearing of the Motion for Summary Judgment sheds some light upon the bases of the District Court's decision, and reveals clearly the error committed by that Court. At page 1 of the transcript (Joint App., A-72), the District Court reveals its clear misunderstanding and misinterpretation of the applicable law. It is there stated,

Under the statute, the ICC has the clear right to examine the books and records of surface freight forwarders to determine what their activities are and whether they are complying with the law and regulations.

As has been amply demonstrated on the record, the inspection and copying provision of Part IV of the Interstate Commerce Act in no manner can be construed or interpreted to grant to the Commission a plenary right of search, but that such right of inspection and copying is limited strictly to the accounting and bookkeeping records of a licensed forwarder which the Commission regulations require to be maintained. Again, at pages 3-4 (Joint App., A-73-74), the Court indicates that under the inspection provision, the Commission is entitled to search all of the records of Associated Air Freight in order to determine whether any such required records are, in fact, present in those files. However, the Court ignores the fact of the admission of the Interstate Commerce Commission that the records that they wish to examine have no relation whatsoever to surface freight forwarding operations. Repeatedly, in the Complaint, in the Formal Demand Letter, and in the Motion for Summary Judgment itself, the Commission has stated that the records they wish to examine are strictly limited to Associated Air Freight's operations as an air freight forwarder, records over which this Commission can have neither interest nor jurisdiction.

Further error is apparent at page 4 of the transcript (Joint App., A-74), where the Court notes that the Federal Rules of Civil Procedure would allow the Interstate Commerce Commission to gain by discovery all of the books and records which they seek to obtain. The Court ignores the due process of law attendant at all times with such discovery requests, in the form of protective orders, et cetera. The inspection and copying provision upon which the Commission relies has no such due process protections available. That statute, as interpreted by the Commission, allows any properly identified Interstate Commerce Commission agent to, at any time within the normal business hours of the regulated company, inspect and copy any record or account covered by such section. The decision as to what records are to be inspected or copied is the Commission's. The regulated company has no option, nor protection, to deny access to such records, save the course taken by Associated Air Freight here. What the District Court has done here, by the wording of its Judgment and Order, is to remove all due process protections from Associated, and to, in fact, grant to the Interstate Commerce Commission a general and open-ended search warrant to examine, investigate, inspect, and copy any record or any other written document which the

Commission agent might find during the course of an examination of all of the files of Associated, regardless as to whether such books and records may be wholly unrelated to the jurisdiction of the Interstate Commerce Commission.

It was precisely this result which the Courts in Burlington Northern and United Airlines sought to prevent. In fact, the District Court in Illinois, in the Civil Aeronautics Board v. United Airlines, supra, decision noted that the Civil Aeronautics Board had both statutory and regulatory authority to conduct formal proceedings relating to investigations, by which administrative subpoena could be issued, and by which the United Airlines documents at issue could be examined. It should be noted in this regard that Section 12 of the Interstate Commerce Act gives the Interstate Commerce Commission the right to institute investigation proceedings and to issue subpoenas pursuant to such proceedings. This fact, however, did not lead the Court in United Airlines to cavalierly dismiss the due process protections available at the issuance of subpoena, and at discovery, and to say, as did Judge Weinstein, that as a practical matter the Commission should have all the documents pursuant to the informal inspection provision. At 399 F. Supp., 1324, at 1327, the Court stated,

Also, for certain violations formal investigations with subpoenas can be initiated. . . . It would be difficult to impute to Congress an intent to provide a formal proceeding for investigation and then to allow the CAB to conduct a complete investigation in derogation of the requirements and protections afforded by the formal procedure. Such an inconsistency should not lightly be allowed.

The decision of the District Court in granting the Motion for Summary Judgment is in clear error. Substantial issues of fact were in dispute, among them whether the documents sought to be obtained by the Commission, and identified as relating solely to air freight forwarder operations, could be made the subject of a Section 412(d) inspection. Moreover, in view of the pendency of a Commission proceeding wherein it is attempting to revoke the surface freight forwarder permit of Associated Air Freight, there was indeed an issue of fact as to whether Associated was within the jurisdiction of the Commission at all. Moreover, and of crucial importance here, there was an issue of fact as to whether Associated Air Freight had indeed denied access to the Commission with respect to those documents and records which the Commission had a right to inspect under Section 412(d).

Admittedly, all of these issues of fact revolve around the overriding issue of law as to the interpretation of Section 412(d), and precisely to what extent such statutory provisions permit a general search by the Interstate Commerce Commission. In any event, the decision of the District Court in granting the Motion for Summary Judgment is in error for the reasons noted above, and merits reversal for such reasons.

III. The District Court Erred
in Failing to Grant the
Motion to Dismiss of
Associated Air Freight, Inc.

Resolution of this assignment of error is a simple matter. Either the records demanded by the Commission to be made available are the type of records to which Section 412(d) is directed, or they are not. The District Court found that this question was immaterial, that because Section 412(d) refers to "any and all" records and documents such section amounted to a general search warrant. This is, of course, the contention of the Commission.

The records which are identified in both the Commission's Complaint and in the Motion for Summary Judgment as being the true purpose of the Commission's demand, are in

no way connected to the Commission's responsibility to regulate surface transportation, nor are such documents in any way connected or related to the conduct of operations, if any, by Associated Air Freight under its Interstate Commerce Commission license. The records which the Commission seeks to have produced are solely limited to records involving operations by Associated Air Freight with respect to air freight forwarding operations subject solely to the jurisdiction of the Civil Aeronautics Board. Such records are not covered by Section 412(d), the Commission is not entitled to demand production for inspection and copying of such records, and no court has authority or jurisdiction to grant an injunction to the Commission to force such production.

The pronouncement of statutory interpretation by Federal Courts as exemplified by Burlington Northern, Inc. v. Interstate Commerce Commission, supra, and Civil Aeronautics Board v. United Airlines, Inc., supra make plain that such records as are sought by the Interstate Commerce Commission here are beyond the jurisdiction of that agency's inspection and copying authority. As such, as a matter of law, no violation of the Interstate Commerce Commission existed upon which to base its request to the District

Court for injunctive relief. No facts were alleged which would constitute such a violation, inasmuch as the records requested to be produced by the Commission were beyond the scope of the involved statute. As a consequence, as a matter of law, the District Court was obligated to grant Associated Air Freight, Inc.'s Motion to Dismiss. For it to do otherwise was clear error, meriting reversal of its Judgment and Order, and requiring an order by this Court to grant such Motion to Dismiss.

The Commission will, no doubt, argue that Associated Air Freight's position here is one essentially academic. The Commission will likely state that a formal investigation proceeding could be instituted, and administrative subpoenas be issued to compel production of all of these documents, in any event. To accept, as did the District Court, such an argument of practical expediency would be to ignore, as did the District Court, the protection of the United States Constitution and the function of due process of law. It must be remembered precisely what power the Interstate Commerce Commission seeks here. They claim that the involved statute gives that agency the right to, at any time during normal business hours, conduct a general search of every piece of

paper which is physically present on the premises of Associated Air Freight's general offices. They seek to do this not through discovery with attendant protections as provided by the Federal Rules of Civil Procedure. They do not seek to do this by the use of subpoenas with attendant due process and Constitutional protections. They seek to do this merely by appearing at the Associated offices, having its agents present identification, and begin the search. They seek to do this knowing full well that the documents which they have admitted they wish to examine are totally unrelated to the system of accounts or bookkeeping record requirements prescribed by Section 412 of the Interstate Commerce Act. They state that because Associated Air Freight, Inc., holds a permit to operate as a surface freight forwarder, regardless of whether or not any operations have been conducted under such permit, Associated Air Freight has voluntarily allowed total, complete, and unrestricted access to the Interstate Commerce Commission with respect to all of its files and records regardless of the subject matter or content thereof. It is submitted that under no circumstances could Congress have intended to grant to this agency such incredible power in a statutory provision which prescribes bookkeeping methods.

CONCLUSION

For the foregoing reasons, Associated Air Freight, Inc., urges this Court to reverse and set aside the Judgment and Order under appeal; to require the dissolution of the injunction issued by the District Court; to vacate the Order granting the Motion for Summary Judgment of the Interstate Commerce Commission; to remand this proceeding to the United States District Court for the Eastern District of New York with an Order requiring that the Motion to Dismiss filed by Associated Air Freight, Inc., be granted.

Respectfully submitted,

Leonard A. Jaskiewicz

Of Counsel:

Grove, Jaskiewicz,
Gilliam & Cobert
1730 M Street, N. W.
Washington, D. C. 20036

January 30, 1976

Edward J. Kiley
1730 M Street, N. W.
Washington, D. C. 20036

Attorneys for Defendant-
Appellant Associated Air
Freight, Inc.

APPENDIX I

ORDER OF
INTERSTATE COMMERCE COMMISSION

No. FF-C-59

SERVICE DATE

ORDER

JUL 16 1975

At a Session of the INTERSTATE COMMERCE COMMISSION, Motor Carrier Board, held at its office in Washington, D. C., on the 9th day of July, A. D. 1975

NO. FF-C-59

ASSOCIATED AIR FREIGHT, INC.
REVOCATION OF FREIGHT FORWARDER PERMIT
(167-16 146th Ave.)
Jamaica, N. Y. 11434

It is found, That pursuant to appropriate order of this Commission the above-named freight forwarder holds authority to operate as a freight forwarder in interstate commerce in No. FF-401 Sub 1.

It is further found, That said freight forwarder has failed to provide and furnish service and has not been performing the operations authorized in violation of the service provision under Section 404(a) of said Act, and the terms, conditions and limitations of said permit and order;

And it is further found, That the said freight forwarder has discontinued operations in interstate commerce as a freight forwarder from and to points authorized under said permit and order, and good cause appearing therefor:

It is ordered, That the said freight forwarder be, and it is hereby, notified and required to inform the Commission, in writing, within 30 days from the date of service of this order, whether any cause exists why an order should not be entered directing it to comply with the aforementioned requirement and terms, conditions and limitations of said permit; or, in the alternative, to indicate that it desires an oral hearing on the subject matter of this order to enable it to show cause why such action should not be taken;

It is further ordered, That if the freight forwarder requests an oral hearing or fails to comply with the terms of the last preceding paragraph, this order shall be construed to be an investigation instituted under Section 403(f) of the Interstate Commerce Act to determine whether, in accordance with the provisions of Section 410(f) of the said Act, its authority should be suspended or revoked for failure by the freight forwarder to comply with the service requirement of Section 404(a) of the said Act and terms, conditions and limitations of said permit.

And it is further ordered, That a copy of this order be served upon the said freight forwarder and that a copy be filed in Docket No. FF-401 Sub 1.

By the Commission, Motor Carrier Board.

(SEAL)

ROBERT L. OSWALD,
Secretary

APPENDIX II

PART IV

INTERSTATE COMMERCE ACT

SECTION 412

PART IV, INTERSTATE COMMERCE ACT

ACCOUNTS, RECORDS, AND REPORTS

Sec. 412. [May 16, 1942, amended August 2, 1949.] [49 U.S.C. §1012.] (a) For purposes of administration of the provisions of this part, the Commission is hereby authorized to require annual, periodical, or special reports from freight forwarders and associations (as defined in this section), and to prescribe the manner and form in which such reports shall be made, and to require from such forwarders and associations specific, full, true, and correct answers to all questions upon which the Commission may deem information to be necessary. Such annual report shall give an account of the affairs of the freight forwarder or association in such fact and detail as may be prescribed by the Commission. The Commission may, in its discretion, for purposes of administration of the provisions of this part, prescribe a uniform system of accounts applicable to freight forwarders, and the period of time within which they shall have such uniform system of accounts, and the manner in which such accounts shall be kept. The Commission may also require any such forwarder to file with it a true copy of any contract or agreement between such forwarder and any person in relation to transportation facilities, service, or traffic affected by the provisions of this part.

Note.—Comparable provisions: Reports, part I, §20 (1), (6); part II, §§204 (a) (1), (2), and (4) and 220 (a); part III, §313 (a); uniform system of accounts, part I, §20 (3); part II, §§204 (a) (1), (2), and (4) and 211 (d) (as to brokers); part III, §313 (c); filing contracts, part I, §§1 (14) (b) and 6 (5); part II, §220 (a); part III, §313 (b); also §409 (b).

(b) Such annual reports shall contain all the required information for the period of twelve months ending on the 31st day of December in each year, unless the Commission shall specify a different date, and shall be made out under oath and filed with the Commission at its office in Washington within three months after the close of the year for which the report is made, unless additional

time be granted in any case by the Commission. Such periodical or special reports as may be required by the Commission under subsection (a) hereof shall also be under oath, whenever the Commission so requires.

Note.—Comparable provisions: Part I, §20 (2); part II, §220 (b); part III, §313 (a).

(c) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by freight forwarders, with respect to service subject to this part, and the length of time such accounts, records, and memoranda shall be preserved, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of money; and it shall be unlawful for freight forwarders to keep any accounts, books, records, and memoranda contrary to any rule, regulation, or order of the Commission with respect thereto.

Note.—Comparable provisions: Part I §20 (5) (6); part II, §§220 (d) and 211 (d); part III, §313 (e).

(d) The Commission or its duly authorized special agents, accountants, or examiners shall at all times have access to and authority, under its order, to inspect and examine any and all lands, buildings, or equipment of freight forwarders; and shall have authority to inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents of freight forwarders and of associations (as defined in this section), and such accounts, books, records, memoranda, correspondence, and other documents of any person controlling, controlled by, or under common control with any freight forwarder, as the Commission deems relevant to such person's relation to or transactions with such freight forwarder. Freight forwarders and persons shall submit their accounts, books, records, memoranda, correspondence, and other documents for the inspection and copying authorized by this subsection, and freight forwarders shall submit their lands, buildings, and equipment for examination and inspection, to any duly authorized special agent, accountant, or examiner of the Commission upon demand and the display of proper credentials.

Note.—Comparable provisions: Part I, §20 (5), (6); part II, §§220 (d) and 211 (d); part III, §313 (f).

(e) The Commission may issue orders specifying such operating, accounting, or financial papers, records, books, correspondence, or documents of freight forwarders as may after a reasonable time be destroyed, and prescribing the length of time the same shall be preserved.

Note.—Comparable provisions: Part I, §20 (7) (b); part II, §220 (d); part III, §313 (g).

(f) As used in this section the words "keep" and "kept" shall be construed to mean made, prepared, or compiled, as well as retained; and the term "association" means an association or organization maintained by or in the interest of any group of freight forwarders subject to this part which performs any service, or engages in any activities, in connection with any traffic, transportation, or facilities subject to this Act.

Note.—Comparable provisions: Part I, §20 (8); part II, §220 (e); part III, §313 (h).

In the
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 75-6126

Interstate Commerce Commission,
Plaintiff-Appellee

v.

Associated Air Freight, Inc.,
Defendant-Appellant

CERTIFICATE OF SERVICE

This is to certify that the foregoing Brief of
Defendant-Appellant has been served on all parties of record,
by first-class mail, postage prepaid, specifically;

John F. Curley, Esquire
Interstate Commerce Commission
26 Federal Plaza
New York, New York 10007

Dated at Washington, D. C., this 30th day of
January, 1976.

Edward J. Kiley